(2)

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-927

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondent.

On Petition For Writ Of Certiorari
To The Iowa Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

HARRY W. ZANVILLE
Counsel of Record
Attorney at Law
3116 Brockway Road
Waterloo, IA 50701
(319) 232-1404

Counsel for the Respondent,
Federal Land Bank of Omaha

DALE L. PUTNAM
Attorney at Law
518 Montgomery St.
P.O. Box 70
Decorah, IA 52101
(319) 382-2984

Counsel for the Respondent,
Federal Land Bank of Omaha

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pd

QUESTION PRESENTED

Was the Iowa Supreme Court correct in following its prior rulings holding that since attorney fees on a contract allowing for the collection of attorney fees are part of the costs, and the successful party is not entitled to costs until judgment is entered, then the statute in effect at the time judgment is entered is controlling?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

COUNTER STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. THE WRIT SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE WRIT, AND THE CASE DOES NOT PRESENT SIGNIFICANT LEGAL ISSUES OR OTHER SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT 5

II. THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE UNITED STATES COURT OF APPEALS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Banker's Trust Company v. Woltz, 326 N.W.2d 274 (Iowa, 1982) 3, 4, 6, 9

Federal Land Bank v. Woods, Decided July 27, 1994 .. 4, 7, 8

Federal Land Bank v. Woods, 480 N.W.2d 61 (Iowa, 1992) 3, 4, 7, 8

Holiday Inns Franchising, Inc. v. Branstad, 29 F.3rd 383 (8th Cir., 1994) 7

McDonald Corporation v. Nelson, 822 F. Supp. 597 (Iowa N.D. 1994) 7

Merrill Lynch v. Knudsen, 749 F.2d 496 (8th Cir., 1984) 5, 9

Merrill Lynch, Pierce, Fenner and Smith v. Knudsen, 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983) 5, 9

STATUTES AND REGULATIONS:

Section 625.22 of the Iowa Code (1975) 1, 6, 7

Section 625.22 of the Iowa Code (1980) 6, 7

RULES CITED:

Supreme Court Rule 13 4

APPENDIX

Appendix A – Promissory Note ..... App. A1

District Court Ruling ..... App. A4

No. 94-927

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondent.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Federal Land Bank of Omaha, respectfully submits this Brief in Opposition to the Petition For a Writ of Certiorari of Donald J. Woods and Lola Jean Woods, Petitioners.

STATUTES INVOLVED

This case involves Section 625.22 of the Iowa Code (1975) which provides as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an

attorney's fee, the Court shall allow and tax as part of the costs:

1. On the first two hundred dollars or fraction thereof recovered, ten percent.

2. On the excess of two hundred to five hundred dollars, five percent.

3. On the excess of five hundred to one thousand dollars, three percent.

4. On all sums in excess of one thousand dollars, one percent.

The statute was changed in 1980. The relevant portion of the statute provided as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the Court shall allow and tax as part of the costs a reasonable attorney's fees to be determined by the Court.

COUNTER STATEMENT OF THE CASE

On February 26, 1975, the Petitioners, Donald and Lola Woods, (Woods) executed a variable interest rate note with the Respondent, Federal Land Bank of Omaha (FLB) (App. A). The note specifically provided: "Reasonable attorney fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce collection (except where prohibited by law). An action for collection was initiated by FLB. The jury found in favor of the Woods on an affirmative defense, and the Trial Court set the amount of the judgment for FLB after off-setting the affirmative defense. The Trial Court did not award

attorney fees pursuant to the note as the Trial Court deemed it impossible to reasonably determine what attorney fees were necessary to obtain payment on the note, and concluded that where there is a successful defense to a portion of the action on a note, the provisions in the instrument for payment of attorney fees are no longer valid. (App. B-D).

Prior to the Trial, the Petitioners had filed an Adjudication of Law Points asking the Court to determine whether Iowa Code Section 625.22 as existed at the time of the execution of the note or as it existed following the 1980 amendment was the controlling Section. No allegations of Constitutional rights were raised in the Adjudication of Law Points. (App. 44-48).

FLB appealed the Trial Court's submission of the affirmative defense to the jury and failure to award attorney fees. The Supreme Court of Iowa reversed and remanded finding that the Trial Court should not have submitted the affirmative defense and that FLB was entitled to an award of attorney fees. *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). The Woods failed to raise any Constitutional allegations in their Reply Brief to the Iowa Supreme Court. (App. 40-43). The Supreme Court followed its previous Ruling in *Banker's Trust Company v. Woltz*, 326 N.W.2d 274 (Iowa, 1982) wherein the Court held that the right to attorney fees are costs and do not vest upon signing the Contract or upon initiation of the action, but only upon recovery, and accordingly, the Statute in existence at the time of recovery is controlling as to the award of attorney fees. *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). Woods did not file for a Writ of Certiorari challenging the Iowa Supreme Court

following its Ruling. Accordingly, this Court lacks jurisdiction to hear the Writ. (Supreme Court Rule 13)

For the first time, in resistance to FLB's request to set attorney fees and enter judgment, the Woods alleged Constitutional violations. The Trial Court properly followed the Supreme Court's prior Ruling, and Woods once again appealed to the Iowa Supreme Court. (App. 33) The Iowa Supreme Court affirmed the District Court as Woods were attempting to relitigate on a new legal theory an issue that had previously been decided by the Iowa Supreme Court, which was the law of the case. (App. 5)

SUMMARY OF THE ARGUMENT

The Petitioners, Woods, failed to raise any Constitutional questions regarding the Application of Section 625.22 of the Code of Iowa to the Trial Court or Supreme Court of Iowa in *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). No Petition For Writ of Certiorari was filed from *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61 (Iowa, 1992). As no Petition for Writ of Certiorari was timely filed following *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992), this Court lacks jurisdiction to hear the present Petition For Writ of Certiorari. (Supreme Court Rule 13)

The Iowa Supreme Court Ruling in *Federal Land Bank v. Woods*, 480 N.W.2d 61 and its second Ruling in *Federal Land Bank of Omaha v. Woods*, decided July 27, 1994, were both in accord with *Banker's Trust Company v. Woltz*, 326

N.W.2d 274 (Iowa, 1982). The decision of the Eighth Circuit Court of Appeals in *Merrill Lynch v. Knudsen,* 749 F.2d 496 (8th Cir., 1984) regarding an award of attorney fees was decided upon a slip opinion decided August 17, 1983, *Merrill Lynch, Pierce, Fenner and Smith v. Knudsen,* 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983). The slip opinion was decided prior to the publication of *Woltz,* and Merrill Lynch had not contested the decision regarding attorney fees based on the prior statute. This decision became the law of the case in *Merrill Lynch v. Knudsen.*

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE WRIT, AND THE CASE DOES NOT PRESENT SIGNIFICANT LEGAL ISSUES OR OTHER SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Woods claim that Constitutional issues were first raised in their Motion to Adjudicate Law Points is incorrect. Woods' Motion to Adjudicate Law Points makes no allegation of Constitutional issues or raises any Constitutional questions. (App. 44-48) The Trial Court did not follow the Adjudication of Law Points Ruling, but found that since the jury had found there was a partial failure of consideration, it would be impossible for the Court to determine the reasonable amount of attorney fees, and when a person successfully defends himself on a substantial portion of the payees' action on a note, the provisions

for payment of attorney fees in the instrument by the borrower are no longer valid. (App. B-D).

No Constitutional issue had been raised to the Trial Court, and it was clear by the Trial Court's Ruling that it was following Chapter 625.22, as amended in 1980, because had the Trial Court been following Chapter 625.22 as it existed in 1975, the Court would have awarded attorney fees on the percentage basis, approximately $1,400.00, and the Judge would not have had to make a determination as to the "reasonableness" of attorney fees.

FLB appealed the submission of the affirmative defense and also the Trial Court's denial of attorney fees. Woods did not raise a Constitutional issue or Constitutional question in its Brief to the Iowa Supreme Court. (App. 40-43) The Iowa Supreme Court did not consider Constitutional issues, as none had been raised. The Iowa Supreme Court followed its prior Ruling in *Banker's Trust Company v. Woltz*, 326 N.W.2d 274, 278 (Iowa, 1982) wherein the Court, facing the same identical issue held:

> We note that the right to attorney fees and costs are statutory, and depend upon the Statute in force at the termination of the proceedings . . . Since no party is entitled to costs until a judgment is recovered, Iowa Code Section 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrue at the termination of the proceedings, and this right exists solely by virtue of the Statute. The extent of the right can be governed only by the Statute in existence at the time the right vests.

The Iowa Supreme Court in *Federal Land Bank v. Woods*, 480 N.W.2d 61, 70 (Iowa, 1992) held that the Woods' contention as to which Statute was applicable was directly contra to the Court's holding in *Woltz*, and reiterated that the Statute in effect when judgment is entered is the controlling Statute. *Id.* The Woods did not file a Petition For Writ of Certiorari from the 1992 *Federal Land Bank v. Woods* Ruling. As such, this Court lacks jurisdiction to grant the Writ of Certiorari. (Supreme Court Rule 13)

The Woods assertion that this case is contrary to the recent decisions of the Eighth Circuit in *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3rd 383 (8th Cir. 1994) and *McDonald Corporation v. Nelson*, 822 F. Supp. 597 (Iowa N.D. 1994) is without merit. Both cases involved the Iowa Legislature passing laws restricting franchise rights. The Courts correctly found that the Law changed the rights which the parties contracted for which they gave consideration for. No consideration was given by the Woods for when they could be sued to collect the note. The note clearly provides for the collection of reasonable attorney fees. (App. A) Both Section 625.22 pre-amendment and post-amendment provide: "When judgment is recovered upon a Written Contract containing an agreement to pay an attorney's fee . . . " As such, Woods knew at the time the Contract was signed that it would not be effective until judgment was recovered. The amendment in the Statute did not require retroactive application to the time the note was executed. Accordingly, the Woods' request for the Court to grant its Writ of Certiorari does not raise a significant legal issue for this Court or for the Federal District Courts, but merely a

decision by the Iowa Supreme Court following two prior decisions.

II.

THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE UNITED STATES COURT OF APPEALS.

The decision from which the Woods seek to have this Court grant its Petition For Writ of Certiorari was decided July 27, 1994, *Federal Land Bank v. Woods.* This decision followed two prior Iowa Supreme Court Rulings, *Woltz* and *Federal Land Bank v. Woods,* (1992). On remand from *Federal Land Bank v. Woods,* (1992) the Iowa District Court correctly followed the Iowa Supreme Court's directives regarding assessment of attorney fees, and in response to Woods' claim of a Constitutional defect raised for the first time held: "The Defendants' contention that the Iowa Supreme Court acted unconstitutionally in holding that Plaintiff is entitled to such attorney fees is also without merit. The recovery of such attorney fees and expenses were provided for in the note the Defendant signed. Further, this Court has no jurisdiction to adjudge any part of a decision of the Iowa Supreme Court to be unconstitutional. (App. 33)

In review of Woods' claim on their second appeal to the Iowa Supreme Court wherein they raised Constitutional allegations for the first time, the Iowa Supreme Court in its July 27, 1994 Ruling held: "Our holding at 480 N.W.2d 70, is the law of the case on that issue and may

not be challenged in subsequent proceedings based on a new legal theory." (App. 5).

This Ruling is not at odds with the Eighth Circuit Court of Appeals Ruling in *Merrill Lynch v. Knudsen*, 749 F.2d 496 (8th Cir., 1984). The decision in *Merrill Lynch* was not based on Constitutional issues. The Eighth Circuit in *Merrill Lynch* relied on its previous Ruling in *Merrill Lynch, Pierce, Fenner, and Smith v. Knudsen*, 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983) as the law of the case. At the time of the Slip Opinion, *Merrill Lynch* was not disputing the claim that attorney fees were based on the pre-existing Statute rather than the amendment.

The timing of the slip opinion is pertinent, as the Iowa Supreme Court decided the same issue in *Woltz* on November 24, 1982, and held:

> We note that the right to attorney fees and costs are statutory, and depends upon the statute in force at the termination of the proceedings . . . Since no party is entitled to costs until a judgment is recovered, Iowa Code Section 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrue at the termination of the proceedings, and this right exists solely by virtue of the statute.

This opinion of the Iowa Supreme Court would not have been published at the time the Eighth Circuit heard argument in *Merrill Lynch* and entered its opinion by following the slip opinion, which became law of that case, but only that case.

CONCLUSION

For the reasons set forth above, the Petition For a Writ of Certiorari should be denied.

Dated this 21st day of December, 1994.

Respectfully submitted,

HARRY W. ZANVILLE
Counsel of Record
Attorney at Law
3116 Brockway Road
Waterloo, IA 50701
(319) 232-1404

Counsel for the Respondent,
Federal Land Bank of Omaha

DALE L. PUTNAM
Attorney at Law
518 Montgomery St.
P.O. Box 70
Decorah, IA 52101
(319) 382-2984

Counsel for the Respondent,
Federal Land Bank of Omaha

FORM 269-Accel. Payt. REV.

Loan No. 147 8135699 Donald J. Woods $ 76,500.00
(Name of Member)

Assignment No. MAR 27 1975

VARIABLE INTEREST RATE NOTE

Omaha, Nebraska, February 26, 1975
(Date)

FOR VALUE RECEIVED, I/we, jointly and severally, as principals, promise to pay to

THE FEDERAL LAND BANK OF OMAHA,

a corporation, or order, at its office in the City of Omaha, Nebraska, the principal sum of SEVENTY-SIX THOUSAND FIVE HUNDRED AND NO/100 - - - - - - DOLLARS with interest from the date hereof on the principal sum remaining from time to time unpaid at the rate of nine percent per annum; the principal sum being payable on an amortization plan of five equal annual payments of TWO THOUSAND SEVEN HUNDRED AND NO/100 - - - - - - DOLLARS plus interest, the first payment being due on the first day of March, 1976, and a like payment maturing on the first day of each March thereafter, and of twenty-four equal annual payments of TWO THOUSAND FIVE HUNDRED TWENTY-FIVE AND NO/100 - - - - - - DOLLARS plus interest, commencing on the first day of March, 1981, with a like payment maturing on the first day of each March, thereafter, and a final payment of TWO THOUSAND FOUR HUNDRED AND NO/100 - - - - - - DOLLARS plus interest, payable on the first day of March, 2005, unless this note is matured at an earlier date by additional

payments, which may be made in any amount at any time.

Such additional payments shall be applied to reduce the unmatured principal owing hereon but shall not postpone or defer the payments provided for in this note, the obligation to continuously make such payments shall remain in force until this note is fully paid.

The Bank may, from time to time, establish a higher or lower rate of interest, which shall thereupon apply to the unmatured balance of the debt evidenced hereby and shall remain in effect until a different rate of interest is established. When a different rate of interest is established, the amount of each subsequent payment shall be increased or decreased to reflect the different rate of interest without in any manner changing the due date of such payments.

If any default be made in any payments of either principal or interest, or in case of failure to comply with any of the covenants, conditions or agreements contained in the mortgage(s) given to secure the payment of this note, then, at the election of the holder of this note, without presentment or demand, the principal sum thereof and all accrued interest thereon shall at once become and be due and payable. All defaulted payments shall bear interest at the rate of ten per centum per annum from the date of default until paid. Reasonable attorney's fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce collection (except where prohibited by law).

The signers, endorsers, sureties, and guarantors of this note hereby severally waive presentment, notice or non-payment, protest and notice of protest, diligence in enforcing the payment hereof, and consent that the time of payment may be extended without notice thereof. Each of the persons signing this note hereby binds his or her separate estate, existing at the date of this note or hereafter acquired, for the payment of this note, and agrees that any release of the security, or of any person liable hereon shall not operate as a release of any other signer, endorser, surety, guarantor of this note.

This note is secured by a mortgage on real estate situated in the County or Counties of Clayton, State of Iowa.

_____ /s/ Donald J. Woods

_____ /s/ Lola Jean Woods

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

THE FEDERAL LAND BANK OF OMAHA, A Corporation, Plaintiff, vs. DONALD J. WOODS and LOLA JEAN WOODS, Defendants.	Case No. 38977 RULING ON POST-JURY TRIAL MOTIONS, DECISION AND JUDGMENT (Filed May 3, 1990)

Plaintiff, The Federal Land Bank of Omaha (the Bank), started this action in July 1982 for payment of the balance allegedly due on a note defendants, Donald J. Woods and Lola Jean Woods (the Woods), gave the bank for a loan to purchase a farm. The action originally asked for the foreclosure of the mortgage on the farm that the Woods gave the Bank as security for the loan. The mortgage was held invalid by the decision of the Iowa Supreme Court in another related action in which the Woods brought an action against other parties.

In their answer, the Woods denied they owed the Bank on the note and affirmatively alleged (inter alia) that the fact that the Bank did not obtain a valid mortgage amounted to a complete failure of the consideration for their signing the note (this was amended to partial failure of consideration a few days before trial). In addition, the Woods' counterclaimed against the Bank for negligence and breach of contract in making the loan without obtaining a valid mortgage.

The trial of this case was delayed for several years pending the outcome of the Woods' action against the other

* * *

The Bank's second ground for Judgment Notwithstanding the Verdict is based on the claim that the affirmative defense of "partial" failure of consideration was not originally pled. In the course of the oral arguments on the post-trial motions, counsel for the Bank conceded that the Woods did file such affirmative defense in an amended Answer filed with leave of the Court several days before trial.

The Bank's last ground for its Motion is based on the argument that as a matter of law the Woods have not suffered any damage by the alleged partial failure of consideration because all of their loss was recovered in their action against Johnson et al in *Moser V.* This point has been extensively discussed earlier and was found to be without merit.

Accordingly, the Bank's Motion for Judgment Notwithstanding the Verdict is *OVERRULED.*

V.

ATTORNEY FEES

Both parties have made claims for attorney fees incurred in this action. The Woods' claim for attorney fees in connection with the counterclaims are no longer viable because the jury rejected all of those claims. The Woods' claim for attorney fees in connection with their successful affirmative defense must also be denied. There

is (with certain exceptions) no statutory provision for the payment of attorney fees unless expressly provided for in a written agreement. There was no provision in the loan agreements for their payment to the Woods. Further, there is no common law right to recover attorney fees as court costs without a specific finding of maliciousness, intentional harassment or injury. *Suss v. Schammel,* 375 N.W.2d 252 (Iowa 1985); *Moser III,* 334 N.W.2d 715 (Iowa 1983). Therefore, the Woods are not entitled to an award of attorney fees resulting from the successful affirmative defense to the suit on the note.

The note on which this action rests does include a provision which states "reasonable attorney fees may be collected as part of this indebtedness in any legal proceeding brought to enforce the collection . . . " Under normal circumstances, an award of attorney fees would be appropriate with respect to the Bank's action to enforce the note. However, in this case the jury found in favor of the affirmative defense raised by the Woods and they were justified in contesting the Bank's action to enforce the note. Under these circumstances, it would be impossible to determine what part, if any, of the Bank's attorney fees were *reasonably* necessary to obtain payment of the note. It is concluded that where, as here, a person successfully defends himself as to a substantial portion of the payee's action on a note, the provisions in the instrument for payment of attorney fees by the borrower are no longer valid. Accordingly, the Bank's claim for attorney fees is denied.

* * *